112-688

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 951.

RHODA MURPHY, ADMINISTRATRIX OF EDMUND H. MURPHY, DECEASED, APPELLANT,

vs.

THE VICTOR SEWING MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 23, 1884

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 951.

RHODA MURPHY, ADMINISTRATRIX OF EDMUND H. MURPHY, DECEASED, APPELLANT,

vs.

THE VICTOR SEWING MACHINE COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

INDEX.

	Original.	Print.
Transcript on appeal from district court	*a*	1
Complaint	1	1
Exhibit A—Copy of agreement between Victor Sewing Machine Co. and Crockwell & Bassett	8	4
B—List of unpaid guaranteed notes, C. & B.	12	6
Answer of Murphy & Grenig	15	7
Crockwell & Bassett	19	9
Order of reference	24	11
Report of referee	25	12
Judgment	30	14
Order for judgment	31	15
Exceptions to findings of referee	32	15
Statement of evidence and exceptions	37	17
Order overruling motion for new trial	39	18
" " " "	40	18
Notice of appeal	41	19
Proceedings in supreme court Utah Territory—		
Hearing	42	19
Judgment	43	20

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Suggestion of death of Murphy, order of substitution and allowing appeal	43	20
Supersedeas bond	45	21
Bond to clerk	47	21
Waiver of citation	49	22
Stipulation as to appeal	50	23
Clerk's certificate	51	23
Stipulation to submit cause	52	24
Assignment of errors	53	24

a

Transcript on Appeal.

Supreme Court of Utah Territory.

VICTOR SEWING MACHINE COMPANY, Plaintiff and Respondent,
vs.
GEORGE W. CROCKWELL *et al.*, Defendants and Appellants.

District Court File. No. 4197.

Filed Oct. 31st, 1882. E. T. SPRAGUE, *Clerk.*

Complaint.

1 In the District Court, Third Judicial District, Territory of Utah, Salt Lake County.

THE VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, Jr., E-MUND H. MURPHY, and DANIEL GRENIG, Defendants.

The plaintiff complains of the defendants, and alleges and shows to the court, on information and belief, that prior to the 11th day of March, 1876, the plaintiff was and still is a corporation duly incorporated and organized under the laws of the State of Connecticut, and that on the 11th day of March, 1876, the said George W. Crockwell and Charles H. Bassett were partners, doing business at Salt Lake City, Utah, in the firm name of "Crockwell & Bassett."

That on the 11th day of March, 1876, the said The Victor Sewing Machine Company, as party of the first part, by L. C. Riggs, its manager and agent for that purpose duly authorized, and the said Crockwell & Bassett, as parties of the second part, entered into and made & mutually delivered an agreement in writing, a copy of which is annexed and marked Exhibit "A," and made a part of this complaint.

That on said 11th day of March, 1876, the defendants, under their hands and seals, made and delivered to the plaintiff their joint and several bond, of which the following is a true and correct copy, to wit:

2 *Bond.*

Know all men by these presents that Geo. W. Crockwell and Charles H. Bassett, Jr., and Edmund H. Murphy & Daniel Grenig are hereby held and firmly bound unto the Victor Sewing Machine Company, a corporation duly chartered under the laws of the State of Connecticut, and situated at Middletown, Connecticut, in the sum of two thousand dollars, lawful money of the United States, to be paid to the said Victor Sewing Machine Company, their representatives or assigns, for which payments, well and truly to be made, we bind ourselves jointly and severally, and the heirs, executors, and administrators of us, and each of us, and all separate estate, firmly by these presents, without any relief from valuation, apprais-ment, or stay law.

Sealed with our seals, and dated this eleventh day of March, 1876.

The condition of this obligation is such that if the above-bounden Crockwell & Bassett shall well and truly pay, or cause to be paid, unto the said Victor Sewing Machine Company any and every indebtedness or liability now existing, or which may hereafter in any manner exist, or be incurred on the part of the said Crockwell & Bassett to the said Victor Sewing Machine Company, whether such indebtedness or liability shall exist in the shape of book accounts, notes, guaranteed leases, renewals, or extentions of notes, accounts, or guaranteed leases, acceptances, endorsements, or otherwise, or whether such liability shall arise from the consignment
3 of machines or other property to the said Crockwell & Bassett by the said Victor Sewing Machine Company under any existing contract, or any contract which shall be hereafter entered into in writing by and between the said Crockwell & Bassett, and the said Victor Sewing Machine Company hereby waiving presentment for payment, notice of non-payment, protest, or notice of protest, and diligence upon all notes or leases now or hereafter executed, endorsed, transferred, guaranteed, or assigned by the said Crockwell & Bassett to the Victor Sewing Machine Company, then this obligation to be void; but otherwise to be in full force and effect. Each obligation in this bond is bound accordingly to its purport without regard to any understanding that another person should also execute it, and without reference to any bond heretofore executed by such obligor or either of the parties hereto, and the person to whom this bond is entrusted has authority to deliver it.

It is further understood that the undersigned hereby agree and consent that the said Victor Sewing Machine Company, or its agent, may in their discretion take or receive from the said Crockwell & Bassett any security whatever, mortgage, personal, or other property, at any time or times, and grant any extention to said Crockwell & Bassett, and that the said company or its agents may at any time consent to the adding one or more obligors to this bond, or consent to the withdrawal of any one or more obligors (such withdrawal to be in writing and accepted by a general manager of said com-
4 pany) without in any way affecting the liability of the remaining obligers hereto, or either of them, or discharging or releasing them, or either of them, from this obligation. And it is further agreed that, if suit be brought to recover any amount due, or to become due, under this bond, that ten per cent. shall be added to such amount or amounts as liquidated damages for the non-payment of the sum [in] controversy.

EDMUND H. MURPHY. [SEAL.]
DANIEL GRENIG. [SEAL.]
GEO. W. CROCKWELL. [SEAL.]
CHARLES H. BASSETT. [SEAL.]

Witnesses:
GEO. SILVERBERG,
As to Murphy.
WILLIAM R. POLLOCK,
As to Grenig.
GEO. WILKINSON,
As to Crockwell & Bassett.

That between the 11th day of March, 1876, and the 1st day of January, 1877, the plaintiff, in pursuance of said agreement marked Exhibit "A," and at the request of the defendants, Crockwell & Bassett, sold and delivered to said Crockwell & Bassett a large number of Victor Sewing Machines of the value of more than five thousand dollars.

And on information and belief the plaintiff alleges that the defendants have not kept or performed the conditions of said bond above set forth, but, on the contrary, have broken the conditions thereof, in this:

That the said Crockwell & Bassett, in part payment for machines sold and delivered to them by plaintiff as aforesaid, made and delivered to plaintiff their four several promissory notes, one for $423.50, dated April 1st, 1876, due 12 months after date, with interest at 6 per cent. per annum, payable at Wells, Fargo & Co.'s bank in Salt Lake city, Utah; one note for $1,216.75, dated May
5 2d, 1876, due 12 months after date, with interest, and payable at said bank; one note for $49.50, dated September 9th, 1876, due 9 months after date, & payable at said bank, and one note for $369.47, dated Sept. 1, 1876, due 12 months after date, with interest, & payable at said bank, all of said notes providing for the payment of 10 per cent. interest per annum after due until paid, and the further sum of 10 per cent. attorneys' fees if collected by an attorney. Also, that said Crockwell & Bassett, between said 11th day of March, 1876, and the 1st day of January, 1877, resold to divers purchasers certain of said sewing machines, and took the notes of the purchasers therefor, and in part payment to plaintiff, for machines sold and delivered to them by plaintiff as aforesaid, the said Crockwell & Bassett endorsed, guaranteed the payment of, and delivered said notes to the plaintiff. That the principal of the notes so endorsed and guaranteed amounts to the sum of ten hundred and twelve dollars, and the schedule hereto annexed and marked Exhibit "B," and made a part of this complaint, contains a true statement of the date of each of said notes, the date when due, the name of the maker, and the amount of the note. That there is due and unpaid to the plaintiff upon the said four notes made by Crockwill & Bassett the sum of $2,059.22 principal, also interest as above specified in said notes severally, and the further sum of 10 per cent. for attorneys' fees, as stipulated in said notes, there is also due
6 on said endorsed and guaranteed notes the principal sum of $1,012 and interest on said several notes at 10 per cent. per annum from the maturity thereof, and also the further sum of 10 per cent. for attorneys' fees, each of said notes stipulating for the payment of 10 per cent. attorneys' fees if collected by an attorney, and for 10 per cent. interest per annum after maturity, and the whole amount now due on said notes made by said Crockwill & Bassett, & said notes endorsed and guaranteed by them is over $4,200 for principal, interest, and attorneys' fees.

That no part of the amount so due has been paid, except that the said Crockwell & Bassett are entitled to a credit thereon of the sum of $1,226.31, the amount of the credit balance on accounts between

them and the plaintiff in respect to machines delivered to them, the said accounts on which said credits appear, not including any charge for their liability on said notes made or endorsed, and guaranteed by them as aforesaid.

That except as above stated the said Crockwell & Bassett, and the defendants, and the makers of said endorsed and guaranteed notes, have failed to pay the said notes made by Crockwell & Bassett, & said notes by them endorsed and guaranteed, or any part thereof.

Wherefore plaintiff prays judgment against the defendants, on said bond for the sum of two thousand dollars, and the further
7 sum of 10 per cent. thereon liquidated damages, and interest from this date, and costs of suit.

Sept. 28th, 1879.

BENNETT & HARKNESS,
Pl'ff's Att'ys.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

Charles W. Bennett, being duly sworn, says: He is one of the attorneys for plaintiff in this action; that the foregoing complaint is true of his own knowledge, except as to matters stated on information and belief, and as to those matters he believes it to be true; that no officer of the plaintiff is in the Territory of Utah; that deponent's information is derived from, & his belief founded on, correspondence with the plaintiff, the possession of the notes mentioned in the complaint, and copies of the agreement and bond mentioned therein.

C. W. BENNETT.

Subscribed & sworn to before me, Sept. 30th, 1879.
ROBERT HARKNESS,
Notary Public, Salt Lake Co., Utah.

8 EXHIBIT "A."

The Victor Sewing Machine Company, incorporated under the laws of the State of Connecticut.

Articles of agreement, made this 11th day of March, eighteen hundred and seventy-six, by and between the Victor Sewing Machine Company, a corporation duly organized under the laws of the State of Connecticut, and situated at Middletown, Conn., of the first part, and George W. Crockwell and C. H. Bassett, Jr., comprising the firm of Crockwell and Bassett, of Salt Lake City, county of Salt Lake, and Territory of Utah, of the second part, witnesseth:

1st. That the parties of the first part have appointed, and do hereby appoint, the said party of the second part agent for the sale of the "Victor" sewing machine in and for the following territory, viz:

The counties of Salt Lake, Davis, Tooele, Summit, Utah, Wasatch, San Pete, Millard, Beaver, Juab, Piute, Iron, Sevier, Kane, Washington, in Utah Territory, with the understanding that so long as this agree-

ment is carried out and kept in force no other agent or agents shall be appointed within said territory.

2nd. That the party of the first part agree to deliver to the party of the second part all "Victor" sewing machines, shipped free of charge at any depot or shipping point in Chicago, Ill.

3rd. The said Victor Sewing Machine Company agree to sell to the said Crockwell & Bassett "Victor" sewing machines at a discount of fifty per cent. from retail list of prices, and parts and attachments at regular agents' prices.

4th. Settlement for "Victor" sewing machines to be made by note at twelve months from first of month following date of invoice, payable to said "Victor" Sewing Machine Company, or their order, at bank in Salt Lake City, with six per cent. interest, or, in lieu thereof, the second party may endorse and assign to the first party hereto promissory notes, drawing interest, which have been given for the purchase of sewing machines, or otherwise, to said second party: Provided, however, That said promissory notes are not made payable on longer time than twelve months from date, or from the time they are received by said first party. Should any notes so drawn and assigned by said second party be on longer time than six months, with interest from date thereof, or from the time they are received by said first party, there will be credited to said second party the face of such notes, and — per cent. of the face in addition thereto, or, if the second party so chooses, the amount due the first party for machines, or any portion of the same, may be paid in lawful money of the United States within 30 days from the date of invoice, and the amount so paid, together with — per cent. of the same, shall be credited to the second party.

5th. In consideration of the appointment aforesaid, and the undertaking and agreement set forth, said Crockwell & Bassett, the party hereto of the second part, hereby assum-s said agency, and undertakes and agrees to maintain and keep open a suitable store or depot in Salt Lake City for the exhibition and sale of the various styles of machines manufactured by the Victor Sewing Machine Company, and also to keep sufficient stock of the same on hand, together with the needles and other accessories sold by the said Victor Sewing Machine Company, to meet the wants of the public, and to supply the local agents which the party of the second part undertake to appoint and maintain throughout said territory; and said George W. Crockwell and C. H. Bassett, Jr., agrees to give during all the time that this agreement shall continue their best efforts and undivided attention to the introduction and sale of machines, accessories, and other articles as aforesaid, and that they will not purchase any other sewing machine manufactured by other parties, and will settle with and pay said "Victor" Sewing Machine Company for all machines or other merchandise ordered from and supplied by them in accordance with the terms and conditions of this agreement.

6th. All parts, attachments, or any other credits, except for machines, to be settled for in cash at 30 days, unless otherwise agreed.

7th. This agreement and the agency hereby established shall re-

main in full force and virtue until annulled by mutual consent: Provided, however, That either party hereto may terminate the same by giving to the other written notice of their intention to do
11 so, in which case the agency shall cease and determine, or, if the first party shall at any time become dissatisfied with the bond furnished by the second part, or in case of a violation of this agreement by the second party, the first party may cancel it if it so chooses without notice.

8th. Should any notes or note that may be delivered under this contract, whether they be drawn or assigned by the second party, not to be paid at maturity, and the same be sent to an attorney or other collector for collection by the first party, then there shall be charged to said second party whatever expenses there may be incurred in collecting, or attempted to collect, said notes, and said amount or amounts shall be due and collectable on demand.

9th. The party hereto of the first part agree to furnish to said Crockwell & Bassett all blanks, notes, circulars, show cards, posters, &c., necessary for carrying on the business.

The party hereto of the second part agree to pay to the said "Victor" Sewing Machine Company two dollars per month for each wagon furnished to said party of the second part; also agree to pay the freight on the same from Chicago and back.

In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

VICTOR SEWING MACHINE COMPANY,
By L. C. BEGGS, *Manager*. [SEAL.]
GEORGE W. CROCKWELL. [SEAL.]
CHARLES W. BASSETT. [SEAL.]

12 EXHIBIT B.

List of Unpaid Guaranteed Notes, Crockwell & Bassett, Form 4.

Date.	Due.	Name.	Amount.
April 3, '76.	Oct. 3, '76.	Jas. Halliday	$25 00
" 3, '76.	March 3, '77.	"	25 00
Oct. 10, '76.	Jan'y 10, '77.	Jens C. Jenson	15 00
" "	April 10, '77.	"	15 00
" "	July 10, '77.	"	10 00
" "	Oct. 10, '77.	"	15 00
" 24, '76.	" 24, '77.	Eliz Boyle, bal	65
Nov. 16, '76.	May 16, '77.	J. A. Groesbeck	94 00
5, '76.	Nov. 5, '77.	Magnus Nelson	52 00
May 27, '76.	May 27, '77.	E. Van Wagoner	50
Nov. 9, '76.	March 9, '77.	Wm. Kimba	20 00
" "	July 9, '77.	"	20 00
" "	Nov. 9, '77.	"	20 00
June 5, '76.	Dec. 5, '76.	Sam'l Memmatt	30
" "	March 5, '77.	"	30
" "	June 5, '77.	"	30
" "	Feb'y 5, '77.	Wm. Memmatt, Jr.	45 00
" "	June 5, '77.	"	45 00

Date.	Due.	Name.	Amount.
June 8, '76.	Dec. 8, '76.	Wm. Duggins	$15 00
" "	March 8, '77.	"	15 00
" "	June 8, '77.	"	15 00
" 10, '76.	May 10, '77.	L. A. Wixon	40
Aug't 25, '76.	May 25, '77.	C. C. Johnson	11
" "	Aug. 25, '77.	"	11
" "	Feb'y 25, '77.	B. F. Raymond	20
" "	May 25, '77.	"	20
" "	Aug. 25, '77.	"	20
13, 14			
Oct. 3, '76.	July 3, '77.	L. B. Rice	25 00
" "	Oct. 3, '77.	"	20 00
" "	Jan'y 3, '77.	"	15 00
" "	April 3, '77.	"	25 00
Sept. 6, '76.	June 6, '77.	Jas. Godfrey	15 00
" "	Sept. 6, '77.	"	15 00
" "	March 6, '77.	"	25 00
Oct. 25, '76.	Oct. 25, '77.	Wilhelmina Smith	60
Nov. 2, '76.	Nov. 2, '77.	David Higgs	39

(Endorsed:) 4197. 3d district court. Victor Sewing Machine Co. *vs.* George W. Crockwell *et al.* Complaint. Filed Oct. 1, 1879. O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Bennett & Harkness, att'ys for pl'ff.

15 In the District Court for the Third Judicial District of Utah Territory, Salt Lake County.

THE VICTOR SEWING MACHINE COMPANY, Plaintiff,

vs.

GEORGE W. CROCKWELL, CHARLES H. BASSETT, EDMUND H. MURPHY, and DANIEL GRENIG, Defendants.

Now comes the defendants, Edmund H. Murphy and Daniel Grenig, and for their answer to the complaint of pl'ff filed herein, deny on information and belief that the conditions of the bond mentioned in the complaint have been broken in respect to the matters mentioned and claimed in the complaint, or in respect to any matters, or at all.

And deny on information and belief that the said Crockwell and Bassett have not paid the said notes mentioned in the complaint, or that they have failed to pay said notes, or any or either of them, and on information and belief deny that there is any sum due on said notes, or either or any of them.

And on information and belief allege that said Crockwell and Bassett paid and discharged said notes, and all their other obligations to the[m] long before the commencement of this action.

And on information and belief these defendants deny that said Crockwell and Bassett guaranteed the notes set forth in the
16 Exhibit "B" of pl'ff's complaint, or in any manner promised,

undertook, or became liable to pay the same. And these defendants, further answering, allege upon information and belief that said contract and bond set forth and sued upon in the complaint were procured by fraud and misrepresentations on the part of the plaintiff, in this: That pl'ff procured said Crockwell and Bassett to execute the same by representing to them that pl'ff belonged to a combination of sewing machine manufacturers which was able and had agreed to keep the price of sewing machines at the figures that they then were when said contract was being negotiated, and that there was no danger of any fall in or depreciation of the price of sewing machines, and that by entering into said contract said Crockwell and Bassett would make a very large amount of money; said plaintiff well knowing at the time that said defendants were inexperienced in the business, and that the[y] would rely on pl'ff's great experience and knowledge thereof, and also very well knowing that at the time of making such representations that the same were untrue, and that the price of machines was about to greatly depreciate, and that said contract would be a ruinous one for the said def'ts, and there was no combination among the manufacturers of sewing machines to keep up or maintain the prices thereof; and these def'ts state on information and belief that said Crockwell and Bassett, relying solely on the representations of said pl'ff, executed said agree-
17 ment and bond on the faith of said false and fraudulent statements, and that if any default has been made in reference to any provisions of said contract, which these def'ts deny, it has resulted solely from an insolvency caused by the unconscionable advantage so fraudulently obtained over them by pl'ff. And these def'ts, further answering, and for equitable relief, here show to the court—

That these defendants were induced to execute the bond sued upon herein by reason of the false and fraudulent representations of pl'ff in this: That the said pl'ff, in order to induce these defendants to sign said bond, represented to def'ts that pl'ff was well acquainted with the business of said Crockwell and Bassett; that they were in good circumstances and good credit, and were good business men; that pl'ff had dealings with them prior thereto, and that they had promptly met and settled all their obligations, and that they were about to make and would make a great deal of money out of the proposed contract with pl'ff, and that def'ts would be entirely safe in going upon their bonds. Whereas in truth and in fact pl'ff very well knew that said Crockwell and Bassett were then in failing circumstances and were not able to pay their debts, and were not good business men, and were at that time greatly indebted to pl'ff, and had not met their obligations, and that they would inevitably lose money on the proposed contract with pl'ff; that pl'ff was well acquainted with the business of said Crockwell and Bassett
18 and knew their circumstances, and very well knew that these def'ts were not aware of their impaired credit and circumstances, and that def'ts signed said bond solely upon the faith and credit which they gave to the said false and fraudulent representations of pl'ff.

Wherefore these defendants ask that said bond be adjudged fraudulent and void as to these defendants, and plaintiff may take nothing by this action, and that def'ts recover their costs.

SUTHERLAND AND McBRIDE,
Att'ys for said Def'ts.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

Edmund H. Murphy, being first duly sworn, deposes as follows: I am one of the defendants herein; I have heard the foregoing answer read and know the contents thereof, and the same is true of my own knowledge, except as to those matters therein alleged on information and belief, and as to those matters I believe it to be true.

EDMUND H. MURPHY.

Sworn to and subscribed before me, this 24th day of October, A. D. 1879.

[SEAL.] EDWARD P. SUTHERLAND,
Notary Public.

(Endorsed:) In district court, 3rd judicial district of Utah. 4197. The Victor Sewing Machine Company *vs.* G. W. Crockwell *et al.* Answer of Murphy & Grenig. Service admitted Oct. 24, 1879. Bennett & Harkness, pl'ff's att'ys. Filed Oct. 24, 1879. O. J. Averill. clerk, by H. G. McMillan, deputy clerk.

19 In the District Court, Third Judicial District of Utah Territory, Salt Lake County.

THE VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, EDMUND H. MURPHY, and DANIEL GRENIG, Defendants.

Now comes the defendants, George W. Crockwell and Charles H. Bassett, and, answering the complaint of pl'ffs filed herein, upon information and belief deny that there is due upon the promissory notes mentioned in the complaint and executed by the defendants the sum of $2,059\frac{22}{100}$ dollars of principal, or any sum whatever, either as principal or interest, over and above the sum of nine hundred dollars.

Def'ts, further answering, deny that there is due upon said guaranteed notes the sum of $1,226\frac{34}{100}$, or any other sum whatever, and allege that said guaranteed notes were turned over to the plaintiff as collateral security for the payment of the notes executed in favor of pl'ff and first sued upon in said complaint, were and are so held by pl'ff, and the pl'ff suing upon said first mentioned notes has waived the right to sue upon the promissory notes guaranteed as alleged in the complaint.

Defendants deny that said promissory notes so guaranteed
20 were endorsed and assigned to pl'ff in payment for machines sold to def'ts by pl'ff.

And defendants further answer and allege that at and after the

execution and delivery of the promissory notes of said Crockwell and Bassett, set forth in the complaint, said Crockwell and Bassett became the owners of certain valuable contracts and obligations for the purchase of sewing machines upon installments, and commonly called "machine leases," the total amount and value of said leases being about the sum of $1,500, that the defendants assigned and transferred said leases to pl'ff as collateral security upon promissory notes; and that plaintiff, as def'ts state on information and belief, collected about $1,200 from said leases, which ought to be applied & credited on said notes in addition to the amounts credited to def'ts in the complaint.

And these defendants, further answering, allege that the said contract and agreement set forth in the complaint and referred to as Exhibit "A," and the said bond sued upon, were and are fraudulent and void, and were procured by misrepresentation and fraud, in this:

That at the time said agreement was made, and for a long time prior thereto, one Elias Howe, or his successors in interest, held a patent from the United States as the original inventor of sewing machines, which was generally known and is hereinafter designated as the "Howe patent," and that at said date, and for a long time prior thereto, all machines were manufactured subject to the su-
21 perior rights of the holders of said Howe patent, and the manufacturers thereof were compelled to pay a royalty or license to the holders of said patent for privilege of manufacturing sewing machines, and that by reason of the contract exercised by the holders of said Howe patent over the manufacturer of machines, and the royalties and payments extorted by them for the privilege of manufacturing machines by other persons and companies, the prices of machines were at that time, and had always been, very high.

That at the time of the execution of the said bond & agreement set forth in the complaint, the said Howe patent had nearly expired, and the right to manufacture sewing machines was then about to become open to general competition.

That the defendants, when pl'ff proposed to them to enter into the contract & agreement set forth in the complaint, objected thereto, for the reason that they feared that said Howe patent, being about to expire, and the exclusive rights and monopoly thereunder being about to be destroyed, and all restrictions upon the manufacture of sewing machines being about to be removed, that the manufacture of sewing machines would enormously increase, and that they would be so depreciated in price that said agreement would prove profitless and financially disastrous to themselves.

That said plaintiff to remove def't- said fears, and to induce them to execute said agreement and bond, fraudulently and falsely
22 represented to these defendants that pl'ffs were members of an association comprising all the manufacturers of sewing machines in the United States, and that said association or combination had agreed together to keep, and were able to and would keep, and maintain the prices of machines at the same figures after

the expiration of said patent that they were before, and that they would keep, and were able to and had agreed to keep, machines up to their prices. All of which representations were false and fraudulent, as pl'ff very well knew, and were made with the fraudulent purpose and intent to induce def'ts to sign and execute said contract and bond, and to enable said pl'ff to obtain an unconsciable advantage over these def'ts at high prices, under said agreement before the said Howe patent should expire, and leaving these defendants to bear the consequent loss. That under said agreement said pl'ff shipped said sewing machines to the value and amount set forth in the complaint, but that by reason of the expiration of said Howe patent, and the removal of the monopoly held by the owners thereof, as hereinbefore stated, sewing machines became depreciated in value at least 100 per cent., and that said defendants were not only unable to dispose at a profit, of machines shipped to [them] under the terms of said contract, but lost a great amount of time and money by reason thereof and were thereby greatly damaged and injured.

23 Wherefore these def'ts pray judgment and decree of this court that said contract and bond be adjudged fraudulent and void and of no effect, and that def't- have judgment for costs.

GOLDTHWAIT & MAXWELL.
SUTHERLAND & McBRIDE.

TERRITORY OF UTAH, } ss:
Salt Lake County, }

George W. Crockwell, being duly sworn, says: I am one of the defendants in the above-entitled action. I have heard read the foregoing answer; the same is true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

GEO. W. CROCKWELL.

Sworn to & subscribed before me, this 24th day of Oct., 1879.
[SEAL.] EDWARD P. SUTHERLAND,
Notary Public.

(Endorsed:) 3rd dist. court, Utah Territory. The Victor S. M. Co. *vs.* George W. Crockwell *et al.* Answer of Crockwell & Bassett. Received service on the within answer this 24th day of Oct., 1879. Bennett & Harkness, pl'ff's att'ys. Filed Oct. 24, 1879. O. J. Averill, clerk, by H. G. McMillan, deputy clerk. Goldthwait & Maxwell & Sutherland & McBride, def'ts' att'ys.

24 At a district court of the third judicial district of the Territory of Utah, county of Salt Lake, held at the court-house, in the city and county of Salt Lake, on the 1st day of November, A. D. 1881.

Present: The Hon. J. A. Hunter, judge of the third judicial district.

VICTOR SEWING MACHINE COMPANY, Plaintiff, }
vs. } 4197.
GEO. W. CROCKWELL *et al.* }

On motion of Mess. Bennett, Harkness & Kirkpatrick, attorneys

for plaintiffs, defendants, by their attorneys, Mess. Sutherland & McBride, consenting—

It is ordered that this cause be, and the same is hereby, referred to E. T. Sprague, Esq., as referee of the court, to hear, determine, and report judgment herein.

I, O. J. Averill, clerk of the district court of the third judicial district of the Territory of Utah, do hereby certify that the foregoing is a full, true, and correct copy of an order made in the above-entitled action on the date mentioned in the caption thereof.

In witness whereof, I have hereunto set my hand and the seal of said court, this 1st day of Nov., A. D. 1881.

O. J. AVERILL, *Clerk*,
By H. G. McMILLAN, *Deputy Clerk*.

25 District Court, Third Judicial District, Territory of Utah, Salt Lake County.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, Jr., EDMUND H. MURPHY, and DANIEL GRENIG.

This action having been referred to me to hear, determine, and report a judgment by an order of the court, dated Nov. 1, 1881, and the proofs and allegations of the parties having been heard and considered, I now make and report the following findings of fact and conclusions of law, and the judgment which should be entered herein, as follows:

1. The defendants, George W. Crockwell and Charles H. Bassett, Jr., who were partners, & who are referred to herein as "Crockwell & Bassett," made and delivered to the plaintiff the agreement annexed to the complaint, and the defendants made and delivered to the plaintiff the bond set forth in the complaint, at the time in the complaint alleged.

2. That afterwards and under said agreement the plaintiff sold and delivered to the said Crockwell & Bassett divers sewing machines, for which Crockwell & Bassett gave to plaintiff their personal notes, described in the complaint, in part payment; and also, in part payment, guaranteed the payment of and delivered to the plaintiff divers notes of purchasers of said machines from said
26 Crockwell & Bassett, a list of which guaranteed notes is annexed to the complaint.

3. That said notes made and guaranteed by said Crockwell & Bassett were due and wholly unpaid at the commencement of this action, except that the said Crockwell & Bassett were entitled to a credit thereon as hereinafter stated.

4th. That there is now due on said personal notes for principal and interest the sum of $3,300, and there is also due on said guaranteed notes for principal and interest the sum of $1,552; making a total of the sum of $4,850; and that said Crockwell & Bassett are entitled to a credit thereon of the sum of $1,226.31, rec'd by plain-

tiff from collections made at various times from the latter part of 1876 to and including part of the year 1879, and which should be applied on the amounts due on said notes as of the time of collection, and, so applied, would reduce the total of the indebtedness to about the sum of $3,200, exclusive of any allowance for attorney's fees claimed in the complaint; and I find that at the commencement of the action the said Crockwell & Bassett were indebted to the plaintiff, in respect to matters set forth in the complaint and on notes given and guaranteed in part payment of machines sold and delivered under said agreement, in a sum exceeding two thousand dollars, exclusive of all offsets & payments, & also exclusive
27 of any att'y fees stipulated in said notes.

5. That the execution of said agreement and bond were not procured, nor was the execution of either procured, by any false or fraudulent representations made to said Crockwell & Bassett, or either of them, by the plaintiff or any of its agents; that Geo. Wilkinson, the agent of the plaintiff, mentioned in the answer, expressed to the said Crockwell & Bassett his opinion that in consequence of a combination or understanding between manufacturers the price of machines would not soon come down, but made no other representation in regard thereto.

6th. No representations were made to the defendant Grenig by or on the part of plaintiff or any of its agents during the negotiation for, or as an inducement to him to execute, or at or prior to the execution by him of the bond set forth in the complaint, nor have any representations been made to said Grenig at any time.

I find the defendant, Edmund H. Murphy, did not execute said bond on or relying upon the representations set forth in the last defense of the answer of the sureties, and that the material part of said alleged representations was not made; that he inquired of George Wilkinson, plaintiff's agent in negotiating said agreement and bond, the object thereof and the condition of the business, and said Wilkinson informed said Murphy that the plaintiff proposed to give Crockwell & Bassett a new contract & larger com-
28 missions and an opportunity to make more money; that so far as they had acted it was to the satisfaction of the plaintiff. I find that the business of Crockwell & Bassett did then appear to be in a good condition, & they had thus far acted to the satisfaction of the plaintiff; that said Wilkinson made no settlement of the business with Crockwell & Bassett, but they had then given and turned over guaranteed notes to the plaintiff to the full amount of their indebtedness; that said notes were not due, and their indebtedness to the plaintiff on cash account very small; that they held in their hands notes and leases taken on sales of machines far in excess of their liabilities, and had said notes and leases, and the notes guaranteed and delivered to plaintiff, been good and collectible, the contrary of which was not then known to the plaintiff or its agent, the business of Crockwell & Bassett would have been in good condition.

6th. That the said George Wilkinson, in Nov., 1876, had no authority from the plaintiff except to take the business out of the

hands of Crockwell & Bassett and turn it over to another party. He did not have in his possession said agreement or bond, or the notes mentioned in the complaint, or exercise or claim to exercise any authority, real or apparent, in regard thereto.

As conclusions of law I find—

1st. That there was due from the defendants, Crockwell & Bassett, to the plaintiff, at the time of the commencement of the action, on account of the matters stated in the complaint, more than the sum of two thousand dollars, the non-payment of which constitute breaches of the said bond.

29 2d. That the execution of said bond was not procured by fraud, and the plaintiff is not barred or estopped from enforcing the same, nor are the sureties thereon or any of them discharged by reason of any matters occurring subsequent to the execution of the bond.

3d. The plaintiff is entitled to judgment against all the defendants for the sum of two thousand dollars, and interest at ten per cent. per annum from the commencement of the action, to wit, the 1st day of Oct., 1879, and costs of suit, to be taxed.

E. T. SPRAGUE, *Referee.*

(Endorsed:) 4197. Victor S. M. Co. *vs.* George W. Crockwell *et al.* Findings. Filed June 29, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

30 District Court, Third Judicial District, Territory of Utah, Salt Lake County.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, Jr., EDMUND H. MURPHY, & DANIEL GRENIG, Defendants. } 4197.

This action having been referred to E. T. Sprague, Esq., to hear, determine, and report a judgment, and the said referee having made his report herein, now, on motion of plaintiff's attorneys, it is considered and adjudged that the plaintiff have and recover of and from the defendants the sum of two thousand dollars, and interest thereon at 10 per cent. per annum from October 1, 1879, making the sum of twenty-five hundred and fifty dollars, and also the costs and disbursements of this action, taxed at $151.05, making the sum of $2,701.05, and that the plaintiff have execution therefor.

Dated July 10th, 1882.

By the court. JOHN A. HUNTER, *Judge.*

(Endorsed:) 4197. District court, 3d jud'l district. Victor S. M. Co. *vs.* G. W. Crockwell *et al.* Judgment. Filed July 10th, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

31 MONDAY, *July* 10, 1882.

VICTOR SEWING MACHINE COMPANY
vs.
GEORGE W. CROCKWELL *et al.* } 4197.

The referee herein appointed by this court, having filed his report and findings, in pursuance of the terms of said reference, and the same being now brought on for hearing, the same is approved and adopted by the court as the findings of the court, and on motion of Mess. Bennett, Harkness & Kirkpatrick, attorneys for plaintiff, it is ordered that judgment be entered herein in favor of the plaintiff and against said defendants for the sum of $2,550.00 found, together with plaintiff's costs on this behalf expended, and taxed at the sum of $151.05; to which rulings and orders defendants, by their attorneys, duly excepted, and filed their exceptions.

32 *Exceptions to Findings of Referee.*

District Court, Third Judicial District of Utah Territory.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEORGE W. CROCKWELL, CHARLES H. BASSETT, JR., EDMUND H. MURPHY, & DANIEL GRENIG, Defendants. } No. 4197.

Now comes the defendant, Edmund H. Murphy, and excepts to the findings of the referee made and filed herein, on the following grounds:

1st. To the fifth finding of fact because it is not justified by the evidence in this: That it finds that the execution of said agreement and bond was not or either of them procured by any false or fraudulent representations to said Crockwell and Bassett, whereas the evidence of the witnesses Bassett (C. H.), Crockwell, Streeper, and Murphy all show that the representations made by p'l'ff's agent, who procured the agreement and the bond, were not "opinions," but professed to be statements of facts known only to him, of all the parties, and which was relied upon as such, and furnished the inducement to the contract, and was false, and the agent had no ground for believing them true, or for the opinion that they were true; and

33 because the evidence does not show that he made no other representation than that stated in the finding, but that he did state that he could from his own knowledge "assure" the parties that there would be no reduction of the prices of the goods.

2d. To so much of the 6th finding of fact that the defendant Murphy did not execute the bond, relying on the representations alleged to have been made to the principals as set up in the last defense set up in the answer, "and that the material part of said alleged representations was not made," because the testimony shows that he did execute it on both grounds—1st. That the partnership business was settled and was prosperous; that the new contract would give them, C. & B., better opportunity to make money, when

the fact was they had not made any money on the old business, were then indebted, as plaintiff now claims, to it in a large sum, which was never paid; that they had no capital of their own, and were relying on making more money out of the new contract, the pl'ff's agent, who represented these things as of his own knowledge both to principals and said Murphy, well knowing at the time that each of them was false, or having in regard to the last representation no ground to believe in its truth. We object to so much of said findings as finds that the business of Crockwell & Bassett did then appear to be in "good condition," because the entire evidence shows that they were without any capital, that the business was limited, and their ability to pay depended entirely upon collections from their customers, and that any business man would know such
34 a condition was utterly unsafe and uncertain, and urgency of the old sureties to be relieved and of plaintiff's agent to procure a new contract and new bonds, shows that he not only knew the precarious condition of the firm, but was diligently providing against it by the new contract and bond. We also object to said finding or so much thereof as is embraced between the words "pl'ff" and beginning with the words "that said Wilkinson," including the closing sentence of said sixth finding that it is not justified by the evidence, because it is an incomplete statement of the evidence and is false in effect, by containing only such parts of the evidence as tried to sustain the conclusion.

There was "a settlement" of the business to the extent that the amount of the liability of the firm to the plaintiff was ascertained, and that the collaterals were accepted as sufficient to secure it, and while one final settlement in terms was formally made, the said Wilkinson gave Murphy to understand, and intended that he should understand and act upon it, that there had been a satisfactory settlement of all past business. We also object to that part of the finding to the effect "that they held in their bonds notes and leases taken on sales of machines far in excess of their liabilities, and had said notes and leases and the notes guaranteed and delivered to pl'ff been good and collectible, the contrary of which was not then known to the plaintiff or its agent, the business of said Crockwell and Bassett would have been in good condition" as being in so far
35 as it is a finding on any issue not justified by the evidence in this, in so far as it tends to show good faith by the pl'ff's agent, the finding is not supported.

The evidence shows that the plaintiff's agent knew he had to rely on the collaterals, and it does not show any inquiry on his part as to their value, while the testimony also further shows that but for the pl'ff's neglect no losses need have occurred on these collateral securities, and in so far as the finding tends indirectly to show that the securities held by the pl'ff were not collectible, the proof is contrary to such conclusion; and we object further to the finding that it is not responsive to any issue between the parties, and is a grouping of such of the facts as tend to exculpate the pl'ff and its agent from the charges made in the answer, instead of a finding of all the facts or a statement of all the material evidence bearing on that

issue; it is incomplete as a statement of the evidence, and is not a correct finding of material facts.

3d. To the 6th finding of fact as to the authority of Wilkinson, that it is not justified by the evidence. There is no evidence limiting his authority as found upon the testimony, unless the agent had the authority claimed by def'ts for Wilkinson; his acts were such a fraud that all benefits received by the company would be released,

36 being procured by one who had no authority; and besides, the proof in the record shows he acted for the company and had entire control of the whole business so far as the def'ts were concerned.

To the conclusions of law:

The second conclusion of law is not warranted by the evidence, and is against law.

To the third conclusion of law, it is not supported by the findings made, and is against the evidence in the case, and is against law; because the pl'ffs are estopped and barred by the acts and declarations of their agent from any right to recover from the def'ts, or either of them, in this case, and because no breach of the bond is shown and no recovery can be had, except upon the bond.

SUTHERLAND & McBRIDE,
Att'ys for Def't named.

(Endorsed:) District court, 3d jud'l district, Utah Territory. No. 4197. Victor Sewing Machine Co. *vs.* Crockwell *et al.* Exceptions to finding. Filed July 10, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

37 TERRITORY OF UTAH, *County of Salt Lake:*

District Court, Third Judicial District.

VICTOR SEWING MACHINE COMPANY, Plaintiff, *vs.* GEORGE W. CROCKWELL, CHARLES H. BASSETT, Jr., DANIEL GRENIG, WILLIAM H. STREEPER, & EDMUND H. MURPHY, Defendants.	No. 4099.
VICTOR SEWING MACHINE COMPANY, Plaintiff, *vs.* GEORGE W. CROCKWELL, CHARLES H. BASSETT, Jr., DANIEL GRENIG, & EDMUND H. MURPHY, Defendants.	No. 4197.

Statement for motion for new trial in behalf of the defendants, William H. Streeper and Edmund H. Murphy, in 4099, and in behalf of the defendant, Edmund H. Murphy, in No. 4197.

These two case- were referred to E. T. Sprague, Esq., to hear, determine, and report a judgment. The cases were tried together, it being stipulated by counsel that all the evidence taken should apply to each case, so far as applicable thereto, and it [was] likewise stipulated by counsel for both parties that but one statement shall be

made, and that the same may be used on motion for new trial,
38 or on any appeal by either party, in both cases, or in either case, accordingly as the party using the statement may have the occasion or wish to apply or use it.

The following is all the evidence given on the trial in both cases applicable to the exceptions, to the findings, or to the errors assigned by said defendants as grounds of their motion. It is also stipulated that the exceptions to the findings of the referee filed by the def'ts in each of these cases shall become and be treated as part of this statement, as an assignment of the particular errors relied on in the motion for new trial.

(Evidence omitted.)

We do hereby certify that the foregoing statement of the evidence and exceptions in the cases aforesaid is full, true, and correct, and the stipulations therein are agreed to.

SUTHERLAND & McBRIDE,
Def'ts' Att'ys.
BENNETT & HARKNESS,
Pl'ff's Att'ys.

I hereby certify that the above is a true statement of the evidence & exceptions on appeal.

JOHN A. HUNTER, *Judge, &c.*

39 District Court, Third Judicial District of Utah Territory.

VICTOR SEWING MACHINE COMPANY, Plaintiff,
vs.
GEO. W. CROCKWELL *et al.*, Def'ts. } No. 4197.

Now on this day comes the def't, E. H. Murphy, by his att'ys, Sutherland & McBride, and on the statements and records on file move- the court to set aside and vacate the findings and judgment herein; and same having been submitted to the court by the counsel of the respective parties, it is ordered that said motion to set aside the findings and judgment against the def't named and for new trial be, and the same is hereby, overruled, it appearing that there is no error in the same, and no sufficient reason for granting the same.

July 10, 1882.

(Endorsed:) District court, 3d jud'l dist., Utah Territory. Victor Sewing Machine Co. *vs.* Crockwell *et al.* Order overruling motion for new trial. Filed July 10, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

40 MONDAY, *July 10th, A. D.* 1882.

VICTOR SEWING MACHINE COMPANY
vs.
GEORGE W. CROCKWELL *et al.* } 4197.

Now on this day come- the defendant, E. M. Murphy, by his attorneys, Sutherland & McBride, and on the statements and records

on file moves the court to set aside and vacate the findings and judgment herein; and the same having been submitted to the court by the counsel for the respective parties, it is ordered that said motion to set aside the findings and judgment against the defendant above named and for new trial be, and the same is hereby, overruled, it appearing that there is no error in the same, and no sufficient reason for granting the same.

41 *Notice of Appeal.*

District Court, Third Judicial District of Utah Territory.

VICTOR SEWING MACHINE COMPANY, Pl'ff,
vs.
GEO. W. CROCKWELL *et al.*, Def'ts. } No. 4197.

Please take notice that the defendant, E. H. Murphy, in the above-entitled action hereby appeals to the supreme court of Utah Territory from the judgment entered herein against him on the 10th day of July, 1882; also from the order therein made denying said def't's motion for a new trial, and from the whole thereof.

SUTHERLAND & McBRIDE,
Att'ys for Def't Murphy.

To the clerk of said court, and Bennett & Harkness, pl'ff's att'ys.

(Endorsed:) Dist. court, 3d jud'l district, Utah Territory. Victor Sewing Machine Co. *vs.* George W. Crockwell *et al.* Notice of appeal. Received a copy of the within notice of appeal as within, this 19th day of Aug., 1882. Bennett & Harkness. Filed Aug. 19th, 1882. O. J. Averill, clerk, by H. G. McMillan, deputy clerk.

42 In Supreme Court.

TUESDAY, *January 9th, A. D.* 1883.

VICTOR SEWING MACHINE CO., Respondent,
vs.
EDMUND H. MURPHY, Imp., &c., Appellant.

From 3d Dist.

This cause coming on regularly for hearing, was argued by Mr. McBride for appellant.

WEDNESDAY, *January 10th, A. D.* 1883.

VICTOR SEWING MACHINE CO., Respondent,
vs.
EDMUND H. MURPHY, Imp., &c., Appellant.

From 3d District.

This cause was further argued by Mr. Harkness, for respondent, and Mr. Sutherland, in reply; submitted, and taken under advisement.

WEDNESDAY, *April 9th, A. D.* 1884.

A session of the supreme court of Utah Territory was held this day, beginning at one (1) o'clock p. m., pursuant to adjournment.

Present and presiding, Hon. John A. Hunter, chief justice; present also, Hon. S. P. Twiss, associate justice, the clerk, marshal, and members of the bar.

Court was duly opened.

43 VICTOR SEWING MACHINE COMPANY, Respondent,

vs.

EDMUND H. MURPHY, Imp., &c., Appellant.

From 3d Dist.

This cause having been argued and submitted at a former term, and the court being sufficiently advised thereon, it is now considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed; and further, that respondent have and recover of and from appellant seventeen and $\frac{70}{100}$ dollars, costs.

FRIDAY, *June 13th, A. D.* 1884.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment.

Present: All the justices, the clerk, marshal, and members of the bar.

Court was duly opened.

VICTOR SEWING MACHINE COMPANY, Respondent,

vs.

EDMUND H. MURPHY, Imp., &c., Appellant.

From 3d Dist.

It appearing to the court that the appellant, Edmund H. Murphy, has died since the final judgment herein entered on the 9th day of April, 1884, and that Rhoda Murphy has been duly
44 appointed and qualified as administratrix of the estate of said appellant, and is desirous of taking proceedings to appeal said cause to the Supreme Court of the United States, on motion of the attorneys for the appellant, Sutherland & McBride, now made, it is ordered that said Rhoda Murphy be, and she is hereby, substituted for the said deceased as a party in said cause.

And said appellants, by their counsel, Sutherland & McBride, in open court, in presence of counsel of respondents, pray for the allowance of an appeal from the judgment of this court to the Supreme Court of the United States, and that the amount of the bond to stay proceedings on the judgment be now fixed, and the court, after considering the same, allows said appeal, and requires that the appellant herein give a good and sufficient undertaking, to be approved by the chief justice of this court in the sum of $5,000.00, and thereupon all proceedings shall be stayed in this action until the hearing of said appeal.

45 Know all men by these presents, that we, Charles Auer and Rhoda Murphy, all of Salt Lake City, Territory of Utah, are held and firmly bound unto the Victor Sewing Machine Company, its successors and assigns. in the just and full sum of five thousand dollars, lawful money of the United States, to be paid to the said Victor Sewing Machine Company, its successors and assigns, to which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 14th day of June, A. D. 1884.

Whereas lately at a term of the supreme court for the Territory of Utah, in a suit depending in said court between the Victor Sewing Machine Company, as plaintiff, and George Wallace Crockwell, Charles H. Bassett, Jr., Edmund H. Murphy, and Daniel Grenig, as defendants, a final judgment was rendered by said court on the — day of April, 1884, affirming a judgment of the district court of the third judicial district of Utah Territory against said defendants for the sum of two thousand seven hundred and one dollars and five cents, including costs taxed at one hundred and fifty-one $\frac{05}{100}$ dollars, and the administratrix of said Edmund H. Murphy, who has died since said judgment, having been substituted as a party to said action by said supreme court, viz., Rhoda Murphy, having prayed and allowed an appeal from said final judgment of affirmance, and the costs thereof to the Supreme Court of the United States, and for a stay of all proceedings thereon pending such appeal:

46 Now, therefore, the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect and answer all damages and costs thereon, and pay or cause to be paid the amount of any judgment which may be entered against her in case said appeal shall fail to be made good, and said judgment be affirmed, or in case said appeal shall be dismissed, then this obligation to be void; otherwise to be and remain in full force and effect.

CHARLES AUER. [SEAL.]
RHODA MURPHY. [SEAL.]

SUPREME COURT OF UTAH TERRITORY.

I hereby approve the foregoing bond on appeal to the Supreme Court of the United States, and certify the same to be good and sufficient as a supersedeas in said action.

JOHN A. HUNTER,
Chief Justice of the Supreme Court of Utah Territory.

We are satisfied with the sufficiency of the foregoing bond, and stipulate that it may be treated as free from all objection on behalf of the appellees as a supersedeas.

June 16th, 1884

BENNETT & HARKNESS,
Att'ys for Appellees.

47 Know all men by these presents, that we, Charles Auer and Rhoda Murphy, of the county of Salt Lake, Territory of

Utah, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, lawful money of the United States, for the payment of which, well and truly to be made, we do hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 14th day of June, A. D. 1884.

Whereas lately at a term of the supreme court of the Territory of Utah, in a suit depending in said court between the Victor Sewing Machine Company, as plaintiff, and George Wallace Crockwell, Charles H. Bassett, Jr., Edmund H. Murphy, and Daniel Grenig are defendants, judgment was rendered final on the —— day of April, 1884, affirming a judgment theretofore entered in the district court of the third judicial district of Utah Territory against said defendants for the sum of two thousand seven hundred and one $\frac{05}{100}$ dollars, together with the costs of said Supreme Court, taxed at —— dollars; and whereas the said Edmund H. Murphy died after the entry of said judgment, and Rhoda Murphy has been appointed and has qualified as administratrix of the estate of said deceased, and was by said supreme court substituted for Edmund H. Murphy, as a party therein, and she having as such heretofore prayed
48 the said court therefor and been allowed an appeal to the Supreme Court of the United States from said judgment of affirmance, and a bond as a supersedeas bond therein having been filed and approved:

Now the condition of this obligation is such that if the said appellant shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs, executors, administrators, all such fees as shall accrue to him as clerk aforesaid, and chargeable to said appellant in the prosecution of said appeal, then this obligation to be void; otherwise to be and remain in full force and effect.

CHARLES AUER. [SEAL.]
RHODA MURPHY. [SEAL.]

I, John A. Hunter, chief justice of the supreme court of Utah Territory, do hereby certify that the foregoing obligors are well known to me, and that they are amply responsible for the amount specified in the foregoing instrument executed by them.

June 16th, 1884.

JOHN A. HUNTER,
Chief Justice of the Supreme Court of Utah.

49 *Stipulation.*

Supreme Court of the Territory of Utah.

THE VICTOR SEWING MACHINE COMPANY, Pl'ff & Respondent,
vs.
GEORGE WALLACE CROCKWELL, CHARLES HENRY BASSETT, Jr., EDMUND H. MURPHY, and DANIEL GRENIG, Def'ts & Appellants.

It is hereby stipulated by and between the counsel of the respect-

ive parties in this action that the appellant, having procured the allowance of an appeal to the Supreme Court of the United States from the judgment of the supreme court of the Territory of Utah, the issuance and service of a citation in this case is waived.

Dated June —, 1884.

BENNETT & HARKNESS,
Att'ys for Pl'ff and Appellee.
SUTHERLAND & McBRIDE,
Att'ys for Def't and Appellant.

50 *Stipulation.*

In the Supreme Court of the United States.

RHODA MURPHY, Administratrix of Edmund H. Murphy, Deceased, Appellant,

vs.

THE VICTOR SEWING MACHINE COMPANY, Appellee.

In this action the original parties defendant, except Edmund H. Murphy, having declined to appeal from the judgment of the court below,, and submitted to the same as final against them, it is stipulated by the appellee above named that this appeal may be heard without objection to their joinder therein in this court.

BENNETT & HARKNESS,
Att'ys for Appellee.

Endorsed: Filed June 17th, 1884. E. T. Sprague, clerk.

51 TERRITORY OF UTAH, } *ss:*
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of Utah Territory, in pursuance of the appeal in said action from the judgment and decision of said supreme court in the cause entitled "Victor Sewing Machine Company, plaintiff and respondent, *vs.* George M. Crockwell *et al.*, defendants and appellants, No 4197," to the Supreme Court of the United States, do herewith transmit to said Supreme Court of the United States the foregoing transcript of the record and proceedings therein, as they are found on file and of record in my office. And I do hereby certify that the foregoing transcript of said record and proceedings, supersedeas bond, bond for costs, stipulation waiving citation, and the other stipulations as to said transcript, record, and proceedings by the counsel therein are full, true, and correct.

Witness my hand and the seal of said supreme court of Utah Territory, this 15th day of September, A. D. 1884, at Salt Lake City.

[SEAL.]

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

52 *Stipulation.*

Supreme Court of the United States.

RHODA MURPHY, Administratix of the Estate of EDMUND H. MURPHY, Deceased, Appellant,

vs.

VICTOR SEWING MACHINE COMPANY, Appellee.

We hereby stipulate that the foregoing is a full, true, and correct transcript of the record in said action in the supreme court of Utah Territory, and of the proceedings therein, save and except the testimony contained in the statement therein filed, which, being immaterial on this appeal, is omitted by consent. We further stipulate that the parties to this appeal to the Supreme Court of the United States from the judgment rendered herein will submit the same for decision on briefs, waiving oral argument, at the October term, 1884.

C. W. BENNETT,
Counsel for Appellee.

53 *Assignment of Errors.*

Supreme Court of the United States.

RHODA MURPHY, Adm'x,

vs.

VICTOR SEWING MACHINE COMPANY.

First. The complaint is insufficient, because, 1st, the alleged liability of the sureties being contingent and collateral to the contract of Crockwell and Bassett with the plaintiff, it was essential to create any liability upon the sureties that within a reasonable time after the alleged default of the principals the sureties should have had notice of both the default and the amount for which they were to be held, and the complaint contains no such allegation, and the contrary appears.

Second. The facts found in this case show that the defendant Murphy was entitled to judgment in his favor on two grounds—

That he was entitled to notice of the default of his principals and of the amount for which he was held, while none was given, and by reason of the fact that when he made inquiry of the state of the business he was mislead and deceived by the plaintiff's agent.

Second. On the facts found he was released as a surety, on the ground that his signature was obtained by a misrepresenta-
54 tion of plaintiff's agent at the time, and that the plaintiff is estopped by its acts and conduct injurious to said Murphy from any right of recovery against him.

June 14th, 1884.

SUTHERLAND & McBRIDE,
Att'ys for Appellant.

Endorsed on cover: Utah Territory supreme court. No. 951. Rhoda Murphy, administratix of Edward H. Murphy, appellant, *vs.* The Victor Sewing Machine Company. Filed 23d September, 1884.

112-693

112-693

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 114.

EMMELINE S. WHITNEY AND JAMES S. BAKER,
PLAINTIFFS IN ERROR,

vs.

ELISHA MORROW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED OCTOBER 15, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 114.

EMMELINE S. WHITNEY AND JAMES S. BAKER, PLAINTIFFS IN ERROR,

vs.

ELISHA MORROW.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	1
Caption	5	2
Transcript of circuit court, Brown co	6	2
Notice of appeal	6	2
Bond on appeal	6	2
Joinder in issue	8	3
Summons and return	10	4
Complaint	11	4
Answer	14	6
Bill of exceptions	16	7
Testimony of M. L. Martin	20	9
Proof of service of bill of exceptions	25	11
Judgment	26	12
Notice of argument of appeal	27	12
Order taking cause under advisement	28	13
Judgment	28	13
Opinion	29	13
Clerk's certificate	32	14
Exhibits—Extracts from Vol. 4, American State papers, &c.	34	15

JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in a suit between Emmeline S. Whitney and James S. Baker, plaintiffs, and Elisha Morrow, defendant, wherein was drawn in question the construction of a treaty or of a statute of the United States, and the decision was against the title specially set up or claimed under such treaty or statutes—

A manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at

2 Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighteenth day of October, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. Wisconsin.

Allowed by me this 15th day of November, A. D. 1880.

ORSAMUS COLE,
Chief Jus. Sup. Court.

[Endorsed:] United States Supreme Court. Emmeline S. Whitney & James S. Baker, pl'ffs, *vs.* Elisha Morrow, deft. Writ of error. M. L. Martin, att'y for pl'ffs.

3 The United States of America to Elisha Morrow, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, 1881, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein Emmeline S. Whitney and James S. Baker are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Orsamus Cole, chief justice of the supreme

court of the State of Wisconsin, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wis.

4 [Endorsed:] United States Supreme Court. Emmeline S. Whitney & James S. Baker, pl'ffs, *vs.* Elisha Morrow, def't. Citation. M. L. Martin, att'y for pl'ffs. Due service of the within citation, by copy, this 18th day of November, 1880, is hereby admitted. Tracy & Bailey, att'ys for E. Morrow.

5 Pleas before the supreme court of the State of Wisconsin, at a term thereof, begun and held at the Capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, the tenth day August, A. D. 1880.

Present: Edward G. Ryan, chief justice; Orsamus Cole, Wm. P. Leyon, Harlow S. Orton, and David Taylor, associate justices; Clarence Kellogg, clerk.

Be it remembered that heretofore, to wit, on the twelfth day of July, in the year of our Lord one thousand eight hundred and eighty, came into the office of the clerk of the supreme court of the State of Wisconsin Emmeline S. Whitney and James S. Baker, and filed in said court their certain notice of appeal and undertaking according to the statute in such case made and provided, and also the return to such appeal of the clerk of the circuit court of Brown county, in said State, in the words and figures following, that is to say:

6 Brown County Circuit Court.

EMMELINE S. WHITNEY and JAMES S. BAKER, Plaintiffs,
vs.
ELISHA MORROW, Defendant.

You are hereby notified that the plaintiffs above named appeal to the supreme court of the State of Wisconsin from the judgment, and the whole thereof, entered herein on the 2d day of April, 1880.

MARTIN AND VROMAN,
Att'ys for Pl'ffs.

To Messrs. TRACY and BAILEY, *Att'ys*, and E. P. BOLAND, *Clerk of said Court.*

State of Wisconsin, Brown County Circuit Court.

EMMELINE S. WHITNEY and JAMES S. BAKER, Plaintiffs,
vs.
ELISHA MORROW, Defendant.

Whereas the above-named plaintiffs are about to appeal from the judgment entered in said court in favor of the defendant and against

the plaintiffs to the supreme court of the State of Wisconsin:

7 Now, therefore, we, ———, ———, sureties, residing in the city of Green Bay, Brown county, Wisconsin, do hereby undertake in the sum of two hundred and fifty dollars that if the judgment be affirmed the appellants will pay all damages and costs which may be awarded against them on the appeal not exceeding two hundred and fifty dollars.

M. RESCH.
PAUL FOX.

STATE OF WISCONSIN, } ss:
Brown County, }

Mitchell Resch and Paul Fox, the sureties who signed the foregoing undertaking, being first severally duly sworn, each for himself, on his said oath, says: That he is a resident freeholder of the State of Wisconsin, and is worth the sum of five hundred dollars over and above all his debts and liabilities in property not exempt by law from execution.

M. RESCH.
PAUL FOX.

Subscribed and sworn to before me, this 9th day of July, 1880.
M. L. MARTIN, *Co. Judge.*

Service of copy of the above and foregoing notice of appeal and undertaking this 9th day of July, 1880, admitted.
TRACY & BAILEY,
Att'ys for Defendant.

8 Circuit Court, Brown County.

EMMELINE S. WHITNEY and JAMES S. BAKER, Plaintiffs,
vs.
ELISHA MORROW, Defendant.

Issue of fact for jury joined Feb. 8, 1873.
TRACY & BAILEY,
Attorneys for Deft.
M. L. MARLIN & C. E. VROMAN,
Attorneys for Pl'ffs.

Filed Aug. 22nd, 1879.

Brown County Circuit Court.

EMMELINE S. WHITNEY *et al.*, Plaintiff,
vs.
ELISHA MORROW, Defendants.

Note of issue. Last pleading served and issue joined December, 1873.
NEVILLE & TRACY & TRACY & BAILEY,
Attorneys for Def't.
M. L. MARTIN, VROMAN & SALE,
HASTINGS & GREEN,
Attorneys for Pl'ff.

Issue of fact for jury. Filed Aug. 23d, 1879.
Filed July 12, 1880. CLARENCE KELLOGG,
Cl'k Sup. C't Wis.

9 Brown County Circuit Court.

EMMELINE S. WHITNEY and JAMES S. BAKER, Plaintiffs,
vs.
ELISHA MORROW, Defendant.

Issue joined Feb'y 8th, 1873.

Please to take notice that the above action will be brought to trial and an inquest taken therein at the next term of the circuit court appointed to be held in and for the county of Brown, at the court-house in the city of Green Bay, on the first day of September next, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated August 21st, 1879.

Yours, &c.,
NEVILLE & TRACY & TRACY & BAILEY,
Attorneys for Def't.

To Messrs. M. L. MARTIN & C. E. VROMAN.

Due notice of the above admitted this 21 day of August, 1879.
M. L. MARTIN & C. E. VROMAN,
Atty's for Pl'ffs.

Cross-service admitted on the last aforesaid date.

——— ———,
Attorneys for ———.

Filed Aug. 22d, 1879.
Filed Jul. 12, 1880. CLARENCE KELLOGG,
Cl'k Sup. C't Wis.

10 THE STATE OF WISCONSIN:

Circuit Court for Brown County.

EMMELINE S. WHITNEY and JAMES S. BAKER, Plaintiffs,
vs.
ELISHA MORROW, Defendant.

The State of Wisconsin to the above-named defendant:

You are hereby summoned and required to answer the complaint of Emmeline S. Whitney and James S. Baker, the plaintiffs in this action, copy of which is herewith served upon you, and you are required to serve a copy of your answer to the said complaint on the subscribers, at their office in the city of Green Bay, in said county, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in the said complaint.

Witness the Hon. E. H. Ellis, judge of said court, at Green Bay, in said county, this tenth day of January, A. D. 1873.

M. L. MARTIN & C. E. VROMAN,
Plaintiffs' Attorneys.

STATE OF WISCONSIN, } ss:
County of Brown, }

I hereby certify that on the 16th day of January, 1873, I
11 personally served the within summons and annexed complaint on the within-named defendant, Elisha Morrow, in the city of Green Bay, in said Brown county, by showing to him the original summons and annexed complaint, and by giving to him and leaving with him true copies of the same, this 16th day of January, 1873.

E. CROCKER, *Sheriff,*
By WM. GRIFFIN,
Under Sheriff.

Fees:

Service	1 00
1 mile	20
6 folios	60
	$1 80

Filed May 19, 1874. L. F. Kellogg, cl'k sup. c't Wis.
Filed July 12, 1880.

CLARENCE KELLOGG,
Cl'k Sup. C't Wis,

Complaint.

State of Wisconsin, Brown County Circuit Court.

EMMELINE S. WHITNEY and JAMES S. BAKER, Plaintiffs,
vs.
ELISHA MORROW, Defendants.

The complaint of the above-named plaintiff- shows to the court: That on the 2nd day of June, A. D. 1870, the plaintiff-, together with the heirs or legal representatives of Augustin Grignon,
12 deceased, were seized in fee of the premises hereinafter described, and that subsequently, to wit, on the 29th day of October, A. D. 1872, the rights and interest therein of the said heirs and legal representatives was sold and conveyed to the plaintiff, Emmeline S. Whitney, so that at the time of the commencement of this suit the said plaintiffs are seized in fee of the entire tract of land in the borough of Fort Howard, in said county, described as follows, to wit: Bounded on the north by private claim No. one (1), confirmed to Jacques Parlier, on the east by Fox river, on the south by vacant strip, confirmed to Alexis Gardepier, and on the west by lot No. one hundred and eleven (111), of Fort Howard reservation, containing ninety-four $\frac{76}{100}$ ($94\frac{76}{100}$) acres.

2. That ever since the dates aforesaid the plaintiffs have been entitled to the possession of said premises, according to their several interests therein.

That ever since the said 2d day of June, A. D. 1870, the defendants has been in the unlawful possession of said premises (except a small

part on the eastern portion of said tract containing about four acres, occupied by Salvo Gunderson, Andrew Neilson, Willard Lamb, Christian Schwartz, and Lars Olsen), and still unlawfully withholds the same from the plaintiffs, to their damage one thousand dollars.

3. That the value of the rents, issues, and profits of said premises, from the said 2d day of June, A. D. 1870, and while the
13 plaintiffs have been unlawfully excluded therefrom by the defendant, as aforesaid (as the plaintiffs are informed and believe), is two thousand dollars per annum.

Wherefore the plaintiffs demand judgment for possession of said premises and damages for withholding the same, and also for the value of the rents, issues, and profits thereof during the time the same have been unlawfully withheld as aforesaid, is the sum of five thousand dollars.

M. L. MARTIN &
C. E. VROMAN,
Att'ys for Pl'ffs.

STATE OF WISCONSIN, }
Brown County, } *ss:*

James S. Baker, being duly sworn, on oath says: That he is one of the plaintiffs in the above-entitled cause; that he has heard the above complaint and knows the contents thereof, and that the same is true of his own knowledge, except those matters stated on information and belief, and as to those matters he believes it to be true.

J. S. BAKER.

Sworn and subscribed before me, this seventh day of January, A. D. 1873.

JOHN B. A. MASSE,
Cl'k Cir. Ct Brown Co., Wis.

(Endorsements:) Emmeline S. Whitney *et al. vs.* Elisha Morrow. Complaint. Filed Jan. 17, 1873. John B. A. Masse, cl'k cir. c't. M. L. Martin & C. E. Vroman, pl'ffs' att'ys.

14

Answer.

Brown County Circuit Court.

EMMELINE S. WHITNEY and JAMES S. BAKER, Plaintiffs,
vs.
ELISHA MORROW, Defendant.

The defendant answers to the complaint:

1. That no allegation thereof is true.

2. That the defendant, and those under whom he claims, entered into possession of the premises which he now occupies in the borough of Fort Howard, being a part of that tract of land commonly known as vacant strip, lying between private claim No. one, and private claim No. two, on the west side of Fox river, in Brown county, Wisconsin, which are, as defendant is informed and believes,

the premises claimed by the plaintiffs in this action, but which they have not correctly described in their complaint, under a claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of said premises, and that there has been a continued occupation and possession of the premises included in such instrument, under such claim, which is adverse to the plaintiffs' claim, for more than forty years before the
15 commencement of this action, and defendant by this, his answer, insists upon any and every defence afforded by any statutory or common law limitation of actions to such title as the plaintiffs may seek to prove on the trial of this cause.

3. The defendant avers that he is in possession of the premises hereinbefore mentioned; that he hold- said premises adversely by color of title founded on a written instrument and asserted in good faith; and that he has made valuable and permanent improvements thereon, consisting of three houses, the clearing and preparing for cultivation of a portion of said lands, and fences built thereon, of the value of three thousand dollars.

Wherefore defendant demand- judgment for the dismissal of the complaint, with costs.

Feb. 7, 1873. NEVILLE & TRACY,
Def't's Att'ys.

STATE OF WISCONSIN, } ss:
Brown County, }

Elisha Morrow, being first duly sworn, on his said oath says: That he is the defendant in this action, and that the foregoing answer is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

ELISHA MORROW.

Subscribed & sworn to before me, this Feb. 7, 1873.
ARTHUR C. NEVILLE,
Notary Public.

16 *Bill of Exceptions.*

STATE OF WISCONSIN:

Brown County Circuit Court.

EMELINE S. WHITNEY and JAMES S. BAKER
vs.
ELISHA MORROW.

At a regular term of the circuit court for Brown county, held at the court-house, in the city of Green Bay, in said county, on the first Monday of September, 1879, before the Hon. George N. Myers, judge of said court, the parties to the above-entitled action, by their respective attorneys, appeared, and a jury having been called and sworn to try the issues between the parties, the following proceedings were had, viz:

The plaintiffs offered in evidence a patent from the United States to Pierre Grignon, dated June 2d, 1870, covering the lands claimed by the plaintiffs in this suit, which, under objection of defendant's counsel, was received in evidence and read to the jury.

The plaintiffs next offered evidence of Peter B. Grignon, which, by consent and stipulation of the parties, was read from the
17 report of a former trial of this cause to show the relationship of Augustine Grignon, Charles Grignon, Paul Grignon, Louis Grignon, Amable Grignon, and Domitille Brunette, claiming to be children of Pierre Grignon, the patentee; also of Peter B. Grignon, the witness, and Robert Grignon, claiming to be heirs of Pierre Grignon, Jr., deceased, a son of Pierre Grignon, the patentee, and of Louis Grignon, Josette Rio, Sophia Fountain, and Angelique Lamerande, claiming to be heirs of John Baptiste Grignon, a deceased son of Pierre Grignon, the patentee, which testimony was read to the jury.

The plaintiffs next offered sundry quit-claim deeds from Louis Grignon and wife, Paul Grignon and wife, Charles Grignon and wife, Domitille Brunette and her husband, Dominic Brunette, and Robert and Peter B. Grignon and wives, to Daniel Whitney; also a deed from Louis Grignon, Josette Rio and husband, Luke Rio, Sophia Fountain and Louis Fountain, her husband, and Angelique Lamereande and Augustine Lamereande, her husband, representing themselves heirs of John B. Grignon, deceased, son of Pierre Grignon, patentee, to James S. Baker, one of plaintiffs; also a deed from Louis B. Parlier, administrator of the estate of Augustine Grignon, deceased, to Emeline S. Whitney, one of the plaintiffs; also,
18 the last will and testament of Daniel Whitney, deceased, by which he devised all his estates, real and personal, by whatever title held and wherever situated, to the plaintiff, Emeline S. Whitney; which several deeds and the will of Daniel Whitney, under objections of defendant, were received in evidence and read to the jury.

The defendant admits that he was at the time of the commencement of this action, and is still in possession of the lands described in the patent offered in evidence by the plaintiffs.

The plaintiffs here rested.

Defendant's attorney moved for a non-suit, on the ground that the plaintiffs have failed to make out their case.

By the COURT: I am not ready to decide upon whom the burden of proof is until morning, but the defendant can introduce his record evidence, and I will decide the motion in the morning.

The defendant thereupon offered in evidence sundry quit-claim deeds tracing title from Alexis Gardepier and wife to Elisha Morrow, defendant, of the north two-thirds of the north half of vacant strip of land confirmed to Alexis Guardapierre by the commissioners to settle land claims at Green Bay, under the act of Congress of February 23d, 1883, the conveyances to the defendant Mor-
19 row being two quit-claim deeds from William Scott and wife to Elisha Marrow, dated April 22, 1863; the plaintiff objected

to the introduction of the evidence, on the ground that no title has been shown in Alexis Guardapierre, under whom the defendant claims; which objection was overruled by the court, and the plaintiffs excepted to the ruling; the said deeds were thereupon admitted in evidence and read to the jury.

The defendants next offered in evidence an entry by Alexis Guardapierre, found on page 722, volume 4, of American State Papers, "of a vacant strip lying between lot number one, confirmed to Jacques Parlier on the north, and a tract number two, confirmed to Louis Grignon on the south, commencing at low water mark and running west eighty arpents and in width three arpents on the aforesaid river," with the decision of the commissioners that the tract described in the entry be confirmed to Guardapierre, which is found on page 723.

The defendant next offered in evidence an entry by Pierre Grignon, dated February 24th, 1823, found on page 721 of volume 4 of American State Papers with the decision of the commissioners on the same page that it be confirmed, provided it shall not interfere with the claim of Alexis Guardapierre.

20 The defendant then raised the question upon whom the burden of proof is in regard to the military occupation of the land, and claimed that the plaintiff ought to be called upon now to show that the act of 1828 took no effect, because the lands were occupied by the military troops.

By the COURT: It seems to me the better way for you to go on with your title and trace it up to defendant; it seems to me you have not offered all your documentary evidence yet, but I will leave you to such course as you may pursue.

The defendant here rested.

The plaintiffs thereupon called M. L. MARTIN as a witness, who, being duly sworn, testified as follows:

I first came to Green Bay in 1827, and commenced the practice of law; I was employed before leaving Detroit to settle some business between Thomas Emerson, of Vermont, and Robert Irwin, Jr., of Green Bay; it seemed that Mr. Emerson held certain demands against Irwin, which Mr. Irwin proposed to pay by conveying to him certain property; a part of the property to be conveyed was a tract of land on which he resided, with the improvements upon it, and two other tracts on which there were no improvements. Immediately after coming to Green Bay I closed the matter with Mr. Irwin by taking conveyances from him of these two tracts of

21 unimproved lands, one of which was described as the north half of a private claim confirmed to Alexis Guardapierre. That is the same conveyance, record of which was introduced by the defendant as a part of his claim of title. This conveyance, I think, was dated May 31, 1827.

I had several letters of instruction from time to time from Judge Shubard Conant, who was Emerson's agent at Detroit, and from Mr. Cole, who was acting as his attorney in reference to this property.

I was directed to sell a portion of the personal property at auction, and to take charge of the real estate before referred to, and sell the same at private sale. In May, 1828, I sold the north half of what was described as the Guardapierre claim to John P. Arnot for two hundred dollars, on time, secured by the endorsement of Daniel Whitney; it was afterwards paid. The deed to Arnot was delivered late in June or some time in July, 1828. I think it was in July. My impression is that it was dated in June, and delivered in July, because our mails were not very frequent in those days, and the papers had to come from Detroit by mail. I had the control and management of this north half of the Guardapierre tract from
22 the time it was conveyed by Irwin to Emerson, in 1827, to the time it was conveyed by Emerson to Arnot, in 1828, there were no improvements of any description upon it until put there after the purchase by Arnot.

Question. What was the northern boundary of that Guardapierre tract that you had control of, as understood at that time?

Defendant objected to the question, as incompetent and immaterial.

Counsel for plaintiff proposed to prove by the witness that the time between Parlier's claim, one, and the vacant strip, was located at that time by the three owners of these respective claims (of Parlier and Guardapierre), and that that location continued to be the line until sometime in 1846, when it was changed.

Defendant objected. Objection by defendant sustained by the court; to which ruling of the court the plaintiffs, by their counsel, duly excepted.

Counsel for plaintiffs further offered to prove, by the witness on the stand, that from 1827 down to 1846, the land known and spoken of as the vacant strip was claimed to be and occupied as a strip only three arpents in width, bounded on the south by claim number two, and no other location or claim was made until after 1846, when, by survey of lot one, made by the deputy United States sur-
23 veyor, the southern boundary of lot one was moved north between two and three arpents.

Defendant objected to the admission of said testimony, as incompetent and immaterial, and the objection was sustained by the court; to which ruling and decision of the court the plaintiffs, by their counsel, then and there excepted.

The plaintiff then offered in evidence a patent, bearing date June 2, 1870, from the United States to Alexis Guardapierre, covering the vacant strip, three arpents in width, between lots one and two, confirmed to him by the commissioners and by act of Congress of 1866.

Defendant objected to the admission of said evidence, as incompetent and immaterial.

Counsel for plaintiffs offered it to show what is treated and considered as the Guardapierre tract in connection with the testimony already offered.

The objection of the defendant to the admission of said patent

was sustained by the court; to which ruling and decision of the court the plaintiffs then and there duly accepted.

The counsel for defendant then asked the court to direct the jury to bring in a verdict for the defendant.

The counsel for plaintiffs asked the court to direct a verdict for the plaintiff.

24 The court thereupon refused the request made by plaintiffs, and directed the jury to render a verdict for defendant; to which rulings and decision of the court the plaintiffs, by their counsel, then and there excepted; and the jurors aforesaid, upon their said oaths, did then and there, by direction of the court, find a verdict for the said defendant: to which the plaintiffs, by their counsel, did then and there except.

And because the several matters herein set forth and the exceptions so taken and made to the opinions & decisions and to the charge to the jury of the said circuit judge, and the verdict rendered by direction of the court do not appear upon the record of the trial of said cause, the Hon. George H. Myers, judge of said court, has settled and allowed this bill of exceptions, and makes it a part of the record in said cause, according to the statute in such case made and provided.

February 2d, 1880.

GEO. H. MYERS, *Judge.* [SEAL.]

STATE OF WISCONSIN:

Brown County Circuit Court.

EMMELINE S. WHITNEY *et al.*, Pl'ffs,
vs.
ELISHA MORROW, Def't.

BROWN COUNTY, *ss:*

25 M. L. Martin, being duly sworn, on oath states: That he served upon Tracy & Bailey, attorneys for defendant, a proposed bill of exceptions and notice in the above-entitled cause on the 17th day of January, 1880, by delivering the same to them at their office in the city of Green Bay, of which the within and foregoing are true copies, and that no amendments thereof have been served upon the attorneys for plaintiffs.

M. L. MARTIN.

Subscribed & sworn to before me, this 29th day of January, 1880.
CHAS. E. VROMAN,
Notary Public.

Filed Jul. 12, 1880. CLARENCE KELLOGG,
Cl'k S. C. Wis.

(Endorsement:) Please take notice that the within is a copy of the bill of exceptions proposed in the above-entitled cause by plaintiffs. Dated Jan'y 17th, 1880. Martin, Vroman & Hastings, for pl'ffs. To Tracy & Bailey, Esqs., att'ys for d'f't.

26 State of Wisconsin, Brown County Circuit Court.

EMMELINE S. WHITNEY and JAMES S. BAKER, Pl'ffs,
vs.
ELISHA MORROW, Defendant.

This action having been duly tried before a jury, and said jury having found a verdict in favor of the defendant, it is now, on motion of Tracy & Bailey, attorneys for defendant, adjudged that the complaint herein be, and it is hereby, dismissed on the merits thereof, and that the defendant recover of the plaintiffs, Emmeline S. Whitney and James S. Baker, two hundred and twenty-five dollars and ninety-five cents, costs of suit.

By the court: EDM. P. BOLAND, *Clerk.*
April 2, 1880.

Let the above judgment be entered, and the clerk of this court is hereby ordered to tax the costs in this action and insert the amount thereof in the judgment.

By the court: GEO. H. MYERS, *Judge.*
April 2, 1880.

(Endorsements:) No. 8646. Filed April 2d, 1880. Edm. P. Boland, cl'k. Filed July 12, 1880. Clarence Kellogg, cl'k S. C. Wis.

27 And afterwards, to wit, on the 26th day of July, A. D. 1880, the following notice of argument was filed in the words and figures following, that is to say:

State of Wisconsin, Supreme Court.

EMMELINE S. WHITNEY *et al.*, Plaintiffs and Appellants,
vs.
ELISHA MORROW, Defendant and Respondent.

Appeal from 10th Circuit.

Please take notice that the appeal from the judgment of the circuit court in the above-entitled cause will be brought on for argument at the August term of the supreme court of the State of Wisconsin, to be held at the Capitol at the city of Madison, on the second Tuesday of August, 1880, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated July 24, 1880.

MARTIN AND VROMAN,
Att'ys for Appellants.

To TRACY AND BAILEY,
Att'ys for Respondent.

28 And afterwards, to wit, at the August term aforesaid of said court, on the 5th day of said term, to wit, on the 3d day of September, in the year aforesaid, the following proceedings were had, that is to say:

Brown Circuit Court.

EMMELINE S. WHITNEY *et al.*, Appellants,
vs.
ELISHA MORROW, Respondent.

Opinion by COLE, J.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by J. J. Tracy, Esq., for the said respondent, and submitted for the said appellants on the printed case and briefs, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards at the term aforesaid, on the seventh day of the term, the same being the twenty-first day of September, in the year aforesaid, judgment was entered by said court in said cause in the words and figures following, that is to say:

Brown Circuit Court.

EMMELINE S. WHITNEY and JAMES S. BAKER, Appellants,
vs.
ELISHA MORROW, Respondent.

29 This cause came on to be heard on appeal from the judgment of the circuit court of Brown county, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the circuit court of Brown county in this cause be, and the same is hereby, affirmed, with costs against the said appellants, taxed at the sum of forty-nine ($49.00) dollars.

Upon the announcement of which judgment the opinion of the court was filed in the words and figures following, that is to say:

EMMELINE S. WHITNEY *et al.*, Appellants,
vs.
ELISHA MORROW, Respondent.

COLE, J.: As we understand the decision of the Supreme Court (see 95 U. S. R., 551), there is really no open question presented on this record. That court distinctly decided that if there was no military occupation of the premises in controversy when the confirmatory act of April 17, 1828, was passed, the title of Gardapier became perfect by force of the confirmation to the entire tract lying between tract number one, confirmed to Jacques Parlier, on the north,
30 and tract number two, confirmed to Louis Grignon, on the south, commencing on the river and running back eighty arpents. The vital question which the court left open for further litigation was whether or not the land claimed by Gardapier was actually occupied for military purposes at and before the passage of the confirmatory act. This military occupation the court held was

a fact to be established or shown by parol proof in the case. It is true the court was not called upon to decide, nor did it decide, upon whom lay the burden of proving the fact that the land was actually occupied for military purposes, so as to defeat the effect of the confirmatory act, but we suppose upon principle the *onus* was upon the plaintiffs who affirmed the fact. For the general rule is: "That the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue" (1 Green. Ev., Sec. 74), and we see no reason for exempting the plaintiffs from the operation of this rule. According to the decision just referred to the grant took effect and passed the title, unless the lands were occupied for military purposes, so as to come within the reservation or proviso. Now, on the trial in the court below no evidence was offered on either side to show that the land was occupied by the United
31 States for military purposes previously to or at the time of the passage of the confirmatory act, and in the absence of all proof upon the subject we cannot presume that it was so occupied. As an essential part of their case, the plaintiffs were bound to prove the fact of such occupancy, in order to defeat the force of the confirmatory act, as construed by the Supreme Court, and this they did not attempt to do. Under the circumstances, therefore, there was no error in the circuit court directing the jury to find for the defendant.

Judgment affirmed.

32 State of Wisconsin, Supreme Court.

EMMELINE S. WHITNEY and JAMES S. BAKER, Plaintiffs,

vs.

ELISHA MORROW, Defendant.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above & foregoing is a true and correct transcript of all the record and proceedings now on file & of record in my office with all things concerning the same in the above-entitled cause.

That the original writ of error, the citation, with its service endorsed thereon, and a copy of the bond are appended to the return therein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, the sixteenth day of April, A. D. 1881.

[SEAL.] CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

33 STATE OF WISCONSIN, } ss:
Supreme Court, }

The return to the within writ appears by the schedule hereto annexed.

The return of the justice, of the supreme court of the State of Wisconsin.

CLARENCE KELLOGG, *Clerk.*

34 EXHIBITS.

Extracts of treaties, laws of the United States, and public documents relating to the title of Pierre Grignon, under whom plaintiffs derive title to the lands described in the within and foregoing transcript.

Extracts from Volume 4, American State Papers.

"MICHILIMACKINAC, *April* 13, 1763.

"I have this date given permission to Messrs. Langlade, *pere et fils*, to live at the post of the La Baye, and do hereby order that no person may interrupt them in their voyage thither with their wives, children, servants, and baggage.

"GEO. ETHERINGTON,
"*Commandant.*"

(American State Papers, Vol. 4, page 852.)

"Par l'honorable Patrice Sinclair, ecuyer, capitaine dans le regiment 84 Me., lieuténant governeur surmetendant et commandant de la poste à Mackinac et dependencies, &c., &c.

"Madame Longlade à permission d'aller á la Baye, pour y
35 entre en possession de ses maisons, jardins, fermes et biens. Elle amene un engagé avec elle.

"Donné sous ma main et sceau de poste ce 14 Sept. 1872.

"PATT. SINCLAIR, [L. S.]
"*Lieut. Gov.*

"Par order de Lieutenant Governeur:

"JOHN COATS."

(Am. St. Papers, Vol. 4, page 852.)

Farm Lot No. 1, West, Jean Bt. Longevin, Senior.

"Entry of land made this twenty-fifth day of May, one thousand eight hundred and twenty-one, by Jean Bt. Longevine, Senior, which is described as follows, viz., it being lot number one, on the west side of Fox river, claimed by James Porlier, and is twelve arpents in width on Fox river, and extends westward far enough to contain one section of land.

"*Testimony.*

"LOUIS GRAVELLE, being duly sworn, deposeth and saith that the Langlade, Grignon, and Longevine families have cut hay on the front part of the above-described tract for forty years last past, or until Colonel Smith prevented them; that he had no knowl-
36 edge of the above claimants having any other right claim to said tract than having married the widow of Grignon."

(Am. St. Papers, Vol. 4, page 860.)

GREEN BAY, *Feb'y 4th*, 1823.

Pierre Grignon enters his claim to a tract of land near Fort Howard, which tract is described in the following affidavit:

TERRITORY OF MICHIGAN, }
County of Brown, } *ss*:

We, the subscribers, do certify that we have lived at Green Bay, county and Territory aforesaid, for the last forty years, with the exception of occasional short absences; that we are acquainted with the claims of all the inhabitants of the bay; that Charles Langlade occupied a piece of ground, lying and being on the west side of Fox river, Green Bay, immediately below the first creek that empties into said river, about fifteen acres in front on said river, and extending back indefinitely; said lot or parcel of land was reserved as a meadow and for wood by said Langlade, at least sixty years ago;
37 that they know said land was occupied by said Charles Langlade, and Charles Langlade, Jr., and Pierre Grignon for the last forty years, until the American troops took possession of this place.

In testimony whereof, we have hereunto set our hands and seals, at the township of Green Bay, county and Territory aforesaid, the 29th day of August, in the year 1822.

his
LOUIS x BELLAIR.
mark.
his
JOSEPH x RIO.
mark.
his
PIERRE x CHARLEFOUR.
mark.
his
BAPTISTE x BRUNETTE.
mark.

Done at the township of Green Bay, county of Brown, the 29th day of August, eighteen hundred and twenty-two.

LOUIS MORGAN, *J. P.*

On this claim of Pierre Grignon the commissioners decide that the same be confirmed, provided that it shall not interfere with a confirmation heretofore made to Jacques Porlier, or with a confirmation made by this board to Alexis Gardapierre.

(4th Volume Am. State Papers, page 721.)

38 *Treaty Between United States and Great Britain.*

"His Majesty will withdraw all his troops and garrisons from all posts and places within the boundary-lines assigned by the treaty of peace to the United States. * * * This evacuation shall take place on or before the first day of June, one thousand seven hundred and ninety-six. * * * All settlers and traders within the precincts and jurisdiction of the said posts shall continue to enjoy

unmolested all their property of every kind, and shall be protected therein. They shall be at full liberty to remain there or to remove, * * * and it shall also be free to them to sell their lands, houses, or effects, or to retain the property thereof at their discretion."

U. S. Stat. at Large, Vol. 8, page 80.

"An act regulating grants of land in the Territory of Michigan."
Approved 3d Mar., 1807.

"Be it enacted, &c.:

"Sec. 2. That to every person or persons in the actual possession, occupancy, and improvement of any tract or parcel of land in his, her, or their own right, at the time of the passing of this act, within that part of the Territory of Michigan to which the Indian
39 title has been extinguished, and which said tract or parcel of land was settled, occupied, or improved by him, her, or them, prior to and on the first day of July, one thousand seven hundred and ninety-six, or by some other person or persons under whom he, she, or they hold or claim the right to the occupancy or possession thereof, and which said occupancy or possession has been continued to the time of the passing of this act, the said tract or parcel of land thus possessed, occupied, and improved shall be granted, and such occupant or occupants shall be confirmed in the title to the same as an estate of inheritance in fee simple: Provided * * * the same shall not contain more than the quantity claimed, nor more than six hundred and forty acres."

U. S. Stat. at Large, Vol. 2, page 137.

"An act * * * to grant donation-rights to certain claimants of land in the district of Detroit, and for other purposes." Apd'd Apr. 23d, 1812.

Be it enacted, &c.:

"Sec. 2 * * * The expense of surveying shall be the same, and the plats of surveys and transcripts of decisions of the commissioners in favor of claimants shall be made and transmitted
40 to the Secretary of the Treasury in the same manner.

"And the certificates granted by the commissioners shall be entered with the register of the land office, and certificates of the register be granted to the party or parties on payment of the same fees and patents granted in every respect in the same manner as is directed by the third section of an act entitled 'An act regulating the grants of land in the Territory of Michigan,' passed the third day of March, one thousand eight hundred and seven."

(U. S. Stat. at Large, Vol. 2, page 710.)

"An act to revive the powers of the commissioners for ascertaining and deciding on claims to land in the district of Detroit, and for settling the claims to land at Green Bay and Prairie du Chien, in the Territory of Michigan," approved May 11, 1820.

Be it enacted, &c.

"Sec. 2. That the said commissioners shall be, and they are hereby,

authorized to employ, with the approbation of the Secretary of the Treasury, a person capable of translating the French language, as an agent for the purpose of ascertaining the titles and claims to land at the settlements of Green Bay, &c.

41 "And after the said agent shall have remained at the places aforesaid a time sufficient for the inhabitants to produce the evidence of their claims, he shall make his report thereof to the said commissioners, who shall have power to examine and decide on the claims so reported to them, according to the laws for adjusting and settling the claims to land in the district of Detroit," &c.

(U. S. St. at Large, Vol. 3, page 572.)

"An act to revive and continue in force certain acts for the adjustment of land claims in the Territory of Michigan," approved Feb. 21, 1823.

"Be it enacted, &c., That the act entitled 'An act to revive the powers of the commissioners for ascertaining and deciding on claims to land in the district of Detroit and for settling the claims to land at Green Bay and Prairie du Chien, in the Territory of Michigan,' &c., shall be, and the same is hereby, revived, and shall continue in force until the first day of November next, &c.

"SEC. 5. That every person who on the first day of July, one thousand eight hundred and twelve, was a resident of Green Bay, Prairie du Chien, or within the county of Michilimackinac, and who, on that day occupied and cultivated, or occupied, a tract of land

42 which had previously been cultivated by said occupant, lying within either of said settlements, and who has continued to submit to the authority of the United States or to the legal representatives of every such person, shall be confirmed in the tract so occupied and cultivated; and the said commissioners in adjudication on lands embraced in this act are authorized to take into their consideration the evidence and facts collected and reported to them by the agents of the United States," &c.

(U. S. St. at Large, Vol. 3, page 724.)

An act for the relief of Francis Laventure and Pierre Grignon.

Be it enacted, &c., That the titles to certain tracts of land at Green Bay, Wisconsin, confirmed to Francis Laventure and Pierre Grignon, * * * and which are described as follows: * * * to Pierre Grignon, for a piece or parcel of ground lying and being on the west side of Fox river, Green Bay, immediately below the first creek that empties into said river, about fifteen acres in front on the said river,

and extending back indefinitely, be, and the same are hereby,

43 ratified and confirmed; and that the commissioners of the General Land Office cause the said tracts of land to be surveyed in the same manner as other private claims to lands in Green Bay have been surveyed; and that he be required to issue patents thereon, &c.

M. L. MARTIN,
Atty for Plaintiffs in Error.

[Endorsed:] United States Supreme Court. Emmeline S. Whitney & James S. Baker, pl'ffs in error, *vs.* Elisha Morrow, def't in error. Writ, transcript, and exhibits. M. L. Martin, att'y for pl'ffs.

Endorsed on cover: Wisconsin sup. court. No. 114. Emmeline S. Whitney and James S. Baker, plaintiffs in error, *vs.* Elisha Morrow. Filed October 15, 1881.